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IN THE

Supreme Court of the United States

No. 298

OCTOBER TERM, 1954

WESTERN MARYLAND RAILWAY COMPANY,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Western Maryland Railway Company prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Pennsylvania, entered at its Middle District sitting in the above entitled case on May 27, 1954.

OPINIONS BELOW

The opinions of the Court of Common Pleas of Dauphin County which were affirmed by the Supreme Court of Pennsyvania are reported in 63 Dauphin County Reports at pages 153 and 160. The opinion of the Supreme Court of Pennsylvania is not yet officially reported, but is unofficially reported in 105 Atlantic Reporter, Second Series, at page 336.

JURISDICTION

(i) The Judgment, review of which is sought, was dated and entered in the Supreme Court of Pennsylvania, Middle District, on May 27, 1954.

(ii) There has been no order granting or denying rehearing in the Court below or extending the time within which to petition for certiorari.

(iii) The jurisdiction of this Court is invoked under title 28 U. S. Code, Section 1257(3).

THE QUESTION FOR REVIEW

Has the Commonwealth of Pennsylvania deprived Petitioner of its property without due process of law, by the action of its taxing officers, sustained by its Courts, in imposing a penalty in the form of retroactive liability for Corporate Loans taxes, near the end of 1946 for the calendar years 1940 to 1945, inclusive, when such retroactive imposition of taxes is a repudiation of long time representations by the Commonwealth's officers and administrative tribunals to Petitioner that no such taxes were owed; is contrary to the law of Pennsylvania relating to retroactive Corporate Loans taxation as it had been previously interpreted for many years by the Pennsylvania Courts and relied upon by Petitioner; amounts to the imposition of a penalty under Pennsylvania law for failure of Petitioner to conform to the Corporate Loans tax law despite the fact that the Commonwealth's officers and administrative tribunals had informed Petitioner on numerous occasions that it was not required to conform to said Corporate Loans tax laws, and also despite the fact that retroactive compliance with said laws is by its nature impossible; and finally when this retroactive penalty-taxation results in

collection from Petitioner of substantially larger sums than would have been collectible if Petitioner had been given timely notice to account annually for the taxes when due.

Otherwise stated, may the Commonwealth of Pennsylvania without violation of the due process clause of the Fourteenth Amendment, retroactively apply a taxing statute, the terms of which constitute a corporation issuing bonds the Commonwealth's agent to ascertain and collect the tax, and, reversing a position of long standing, require its agent to conform for past years to the provisions of the statute, which as construed by its Courts for many years are such that they can only be complied with currently, and in addition, impose on its agent a penalty for failure to perform the impossible.

CONSTITUTIONAL PROVISION INVOLVED

It is Petitioner's position that the action of the officers of the Commonwealth of Pennsylvania and of the Courts of that State in sustaining such action are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States providing: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner descends from a Maryland Corporation organized in 1852 which built a line of railroad westward from Baltimore to Hagerstown in Maryland. To extend its lines westward to Cumberland, acquire lines of railroad and property in West Virginia and to connect with them, it issued a First Mortgage dated October 1, 1902 under which $46,663,000 of First Mortgage 4% Bonds due October 1, 1952 were issued. These bonds and their underlying Mort-

gage when issued were a first lien on property wholly in Maryland and West Virginia, except for a few hundred feet of track in Pennsylvania east of Hagerstown at Blue Ridge Summit, Pennsylvania (R. 19a, 20a, Appellant's Ex. 5, P. 27-8).[1]

By 1917 the original Company had defaulted on a Second Mortgage, and there had been a foreclosure in 1910. A new Maryland company was organized to continue operation of the property, and lines had been built into Pennsylvania and acquired by Petitioner's predecessor through subsidiary companies.

Effective February 23, 1917, Petitioner was formed by a consolidation of the parent Maryland corporation with the several Pennsylvania subsidiary companies under the provisions of the applicable laws of Maryland and under the Railroad Consolidation Act of Pennsylvania of March 24, 1865, P. L. 49. (Title 67 Purdon's Code, Section 601.) Petitioner as a result became for the first time a corporation of both Maryland and Pennsylvania (R. 19a, 20a).

The First Mortgage of October 1, 1902 was assumed by Petitioner and remained at all times a first lien on the Maryland and West Virginia property, and by the consolidation it became a lien on Petitioner's Pennsylvania properties. The First Mortgage 4% Bonds due October 1, 1952 were likewise assumed by Petitioner and remained outstanding in most of their principal amount until maturity.[2]

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[1] References are to pages of the record as printed for the Supreme Court of Pennsylvania and to exhibits filed separately as numbered for that Court.

[2] The First Mortgage Bonds of 1902 were replaced by an issue of General Mortgage Bonds (now denominated First Mortgage Bonds) issued under a General Mortgage dated October 1, 1949 (R. 21a, 22a).

Pennsylvania has for a great many years taxed bondholders at 4 mills on the dollar of par value (5 mills in 1936 and 8 mills from 1937 to 1943, inclusive) of all corporate bonds issued by Pennsylvania companies and owned by individual and certain other classes of residents of the State. In 1919 it extended the tax to bonds assumed by Pennsylvania corporations. By the terms of the statute the Treasurer of the corporation issuing the bonds is required to determine whether the bonds are held in such ownership as to make them subject to the tax, and if they are so held, to deduct the tax from the interest paid at the time of payment and subsequently return and pay the tax to the Commonwealth. For this service he is allowed a commission by the statute.[1]

The text of the Corporate Loans Tax Act as reenacted in 1935, and amended in 1945 (Title 72 Purdon's Code, Sections 3250-10, 3250-11a), and under which the taxes involved in this case were levied, is quoted in full in Appendix I.

When, therefore, in 1917 Petitioner became a corporation of Pennsylvania the question of liability for Corporate Loans taxes on the $46,633,000 of First Mortgage 4% Bonds of 1902 was presented (R. 22a). Petitioner then took the position and has ever since maintained, that since these bonds were issued by a Maryland corporation, Petitioner, for a number of reasons not here material, may not be required to assess and account for the Corporate Loans tax.

[1] Petitioner's First Mortgage 4% Bonds of 1902 were issued with a provision that the interest payments would be free of any tax deductions (Ex. 5 P. 13). Consequently the Corporate Loans tax if applicable is petitioner's liability, but in order to calculate the extent of the tax it must pay for the bondholders, Petitioner's treasurer is required to make the same determination as to whether or not the bonds are owned in taxable hands *at the time interest is paid,* as if the tax were to be deducted from the interest payments.

Between that time and 1946 the taxing authorities of Pennsylvania, including its Board of Finance and Revenue, which is an administrative tribunal and empowered to determine tax liabilities (Title 71 Purdon's Code, Section 115; 72 Purdon's Code, Sections 501, 503, 4142), have on four separate occasions, each under a different State administration, agreed with Petitioner's position and have decided that Petitioner was not obligated to calculate and account for the Corporate Loans tax in respect of the First Mortgage Bonds of 1902. Briefly described the occasions were these:

(1) In 1920 the taxing officers decided that *Commonwealth v. Lehigh and Hudson River Railroad Company,* Court of Common Pleas of Dauphin County, (November, 1920) 8 Pa. Corporation Reporter 417, controlled, and under that decision Petitioner was not liable for any loans taxes, because the bonds of 1902 were issued by a Maryland constituent corporation of the consolidated company and Pennsylvania had no jurisdiction to require the Maryland constituent to act in the State of its incorporation to the extent necessary to compute and account for the loans tax (R. 22a).

(2) In 1931 the Board of Finance and Revenue after formal hearing and considering briefs, issued a resettlement of Corporate Loans taxes for the year 1928, which was the year then on appeal, excluding any of the Bonds of 1902 from Corporate Loans taxes (R. 23a, 24a, 32a).

(3) In 1938 the Attorney General of Pennsylvania after an exhaustive consideration of the subject by all interested departments, joined Petitioner in a stipulated judgment entered in the Court of Common Pleas of Dauphin County, that there was no liability for Corporate Loans taxes on

these bonds of 1902 for the years 1924 to 1927, inclusive, for which years the question had been reopened in 1936 (R. 25a, 34a, 37a, 40a).

(4) In 1943 (which is one of the years involved in this petition and in which the Commonwealth has reversed its position) the taxing officers, confessing error in having settled the Loans tax on these bonds of 1902, procured authority from the Board of Finance and Revenue to exclude the bonds from taxation for the years 1935 to 1939, inclusive, and pursuant to this authorization the Attorney General in 1943, for a second time joined the Petitioner in a stipulation for a judgment in the Court of Common Pleas of Dauphin County conceding that no tax was due on these bonds, the stipulation relating to the year 1936 which was on appeal to the Court on another issue (R. 26a, 44a, 48a, 49a).

Should this petition for certiorari be granted, the details of these decisions will be developed to show their definite nature and Petitioner's justification for relying on them.

In every year since 1937, and during the years 1940 to 1945, inclusive, Petitioner made a statement on its return of Corporate Loans taxes that no taxes were due in respect of the First Mortgage Bonds of 1902 because they were bonds of "a corporation of the State of Maryland held not taxable by the Board of Finance and Revenue, (decision rendered June 1931 for the year 1928)." No exception was at any time taken to the correctness of this assertion (R. 24a). On the contrary since it was accepted by the 1943 action as correct for 1937 to 1939, Petitioner considered it accepted for subsequent years.

However, in 1944 some Philadelphia banks holding these bonds and others in trust accounts, appealed from an assessment of local personal property taxes on the bonds.[1] In this proceeding, to which Petitioner was not a party, although it filed a Brief and argued the case as *amicus curiae* in the Supreme Court (R. 28a), it was held (May 27, 1946) that the fact that the corporate treasurer was personally and officially a non-resident of Pennsylvania, (one of the several grounds relied on by Petitioner in previous years for non-liability for Loans tax obligations in respect of its 1902 bonds) did not prevent imposition upon the corporation of the obligation to assess, collect and account for the Corporate Loans tax. *Appeal of Fidelity-Philadelphia Trust Company* (1946), 354 Pa. 355.

When this decision was rendered the taxing officers of Pennsylvania, notwithstanding the fact that the decision contained no requirement for any retroactive action, reversed the position they had adhered to since 1920 and imposed, in the latter part of 1946, Corporate Loans taxes upon Petitioner for the six years 1940 to 1945, inclusive, in respect to the 1902 Bonds (R. 29a). In these years, for some reason not explained on the record, the usual annual tax settlements had not been made currently. Petitioner's appeals from these retroactive penalty-taxes were dismissed by the Court of Common Pleas of Dauphin County, which over Petitioner's vigorous exceptions (R. 82a) indicated that it considered it Petitioner's fault that the Commonwealth's officers had not collected the taxes (R. 75a, R. 89a), and entered judgments for $462,680.48, with interest from

[1] Under the law of Pennsylvania if bonds of this type are not subject to Corporate Loans taxation by the State, they become subject to local assessment for personal property taxes. See *Appeal of Fidelity-Philadelphia Trust Company* (1946), 354 Pa. 355.

October 1, 1946.[1] The Supreme Court of Pennsylvania refused to give any significance to the more than 20 years of administrative rulings and sustained the imposition of the penalty-taxes (See Opinion, Appendix II). It is from this decision that certiorari is now sought.

Petitioner, because of its reliance on the consistent rulings of the administrative officers for over a period of more than 20 years that the loans tax was not applicable to its First Mortgage Bonds of 1902, following the practice of many years ,maintained no complete record during 1940 to 1945 of the identity and places of residences of the owners of its said bonds, as it would have had to do if compliance with the Loans tax law had been required of it. Consequently, when the 1946 tax settlements were made following the *Fidelity Philadelphia Trust Company* case, it had no list of owners for any year except a partial record of 1945 interest payments. The Commonwealth agreed to use this list as a basis for settlement for all of the years (R. 29a). However, because even this list was not accurate, not having been prepared at the time interest payments were made with the express purpose of fully identifying and locating all bondholders so that loans taxes could be accurately calculated, Petitioner is subjected in the judgments in this case to more than $37,000 of taxes on nearly $950,000 par value of bonds whose owners at the 1945 interest payment dates cannot now be ascertained.[2]

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[1] Pursuant to a stipulation for correction of the amounts of the judgments for any unidentified bond owners subsequently found to be non-residents of Pennsylvania, the amounts can probably be reduced to $378,109.15, exclusive of interest.

[2] It is the practice of the Pennsylvania taxing authorities to require payment of tax on all bonds whose owners cannot be ascertained even though there are no circumstances indicating possible Pennsylvania ownership.

In addition, it is obvious that if these taxes were lawfully due and had been promptly settled in the years 1940 to 1945, inclusive, the ultimate cost to Petitioner would have been reduced by substantial parts of the amounts of these taxes in some of the years, by taking them as lawful deductions in computing its Federal Income and Excess Profits taxes during the high tax war years. These are sums which Petitioner cannot now recover, because if these judgments are sustained Petitioner must include these tax payments in its Federal Income Tax computations in current years (adjustment of the war years being barred by limitations) when taxes are at lower rates. The amount of loss to Petitioner as the result of this situation has not been calculated, but is estimated to be not less than $175,000.

FEDERAL QUESTION RAISED

The question of denial of due process of law was first raised by Petitioner's exceptions (R. 86a) to the decision of the Court of Common Pleas of Dauphin County in sustaining the taxing officers of the Commonwealth in making these retroactive tax settlements. When this exception was overruled (R. 92a), the question was presented to the Supreme Court of Pennsylvania, which completely ignored the point in its final decision. See Appendix II.

ARGUMENT

General Statement

Petitioner is fully aware of the principle illustrated by *Great Northern Railway v. Sunburst Oil & Refining Company* (1932), 287 U. S. 358, and similar cases, that a State does not ordinarily transgress any of the prohibitions of the Fourteenth Amendment by giving retroactive effect to

the decisions of its Courts. Petitioner does not challenge this principle.

The present case is entirely outside of the latitude which a State has under the *Great Northern Railway* case. We are here dealing with a peculiar Pennsylvania statute, which as construed by the courts of the Commonwealth over a period of many years, imposes a tax on bondholders which is to be deducted from bond interest payments to Pennsylvania residents when they are made; which constitutes the corporation issuing the bonds, or its treasurer, the agent of the Commonwealth, to ascertain and collect these taxes due from the bondholders when such interest payments are made, and duly report and pay it over to the Commonwealth at stated intervals. Such a statute is not capable of retroactive application. The Commonwealth cannot, consistently with due process of law, tell Petitioner in 1946 that it must do the impossible, that is, that it must then do the things prescribed by the statute which by their nature could only have been done in 1940 or in one of the other past years to 1945. If Petitioner is in default and properly liable to a penalty for not having performed as agent of the Commonwealth the things prescribed by the statute, it may be penalized or otherwise held liable as a defaulting agent. But Petitioner had been consistently and repeatedly informed by the officers of the Commonwealth for more than 20 years, and these instructions were repeated during the years involved in this proceeding, that its agency did not require it to take any action with respect to the First Mortgage Bonds of 1902, at the time when the agent had to act if it was to act at all, that is, when the interest payments were made. Years later, to reverse these instructions and inform Petitioner that it should have fulfilled the statutory prescriptions in those past years,

and to now charge Petitioner with a penalty of more than half a million dollars, is a clear deprivation of the due processes of law. In this situation, there is a retroactive application of a State court's decision which is not within the *Great Northern* case, because it requires performance of the impossible and penalizes Petitioner for not doing the impossible.

Appeal of Fidelity Philadelphia Trust Company (1946), 354 Pa. 355, which held that the non-residence of the corporate treasurer could not prevent the Commonwealth from requiring the corporation to fulfill the agency requirements of the Corporate Loans tax statute and account for the tax payable on the corporate bonds, contained no provision whatever that its decision should be given retroactive effect. The decision to make such a retroactive application was that of the Commonwealth's taxing officers. It represented a complete reversal of the course of dealing with the Petitioner for more than 20 years, a repudiation of their consistently maintained position that Petitioner's First Mortgage Bonds of 1902 were not subject to the Corporate Loans tax, and it was directly in the teeth of unchallenged and long standing Court decisions in Pennsylvania that the Corporate Loans tax could not be retroactively applied in any years in which the Commonwealth had given its corporate agent ground to believe that the obligations of the agency would not be required of it.

It is Petitioner's position that the action of the Commonwealth's officers was arbitrary, capricious and whimsical and that when it was sustained by the Pennsylvania Courts, Petitioner's property was taken from it without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Construction of the Tax Statute by the Pennsylvania Courts

In order to understand the manner in which Petitioner has been deprived of due process of law, by the retroactive penalty-taxation as outlined above, it is necessary to set forth briefly the extent of the Petitioner's obligations under the Corporate Loans tax statutes as developed by the decisions of the Supreme Court of Pennsylvania and the lower Courts over a period of a great many years.

First of all, it is completely established that the tax imposed by the statute is not a tax on the corporation issuing the bonds, but is a tax on the owners of the bonds, and that the corporation is merely an agent of the Commonwealth for the assessment and collection of the tax.

Commonwealth v. Lehigh Valley Railroad Company (1898), 186 Pa. 235;
Com. v. Sun Oil Co. (1928), 294 Pa. 99;
Appeal of Fid.-Phila. Trust Co. (1946), 354 Pa. 355.

In the case first mentioned, the Supreme Court of Pennsylvania said:

> "The tax is not in any sense or in any degree a tax on the corporation or its property, but on the individual citizen of the state who holds the bonds. The corporation is chargeable with it only as a collector, and by reason of default in the duty to collect."

It is equally well established that the liability of the corporation itself for the tax is of a secondary nature, based upon a finding that there has been a default in performance of the duties of the statutory tax-collecting agency.

Commonwealth v. Delaware Division Canal Company, (1888), 123 Pa. 594;
Commonwealth v. Wilkes Barre & Scranton Railway Company (1894), 162 Pa. 614.

In the case first mentioned, the Supreme Court of Pennsylvania said:

> "The act constitutes the Company, or its treasurer as such, the collector of the tax and upon failure to discharge the duty imposed by law, the settlement is properly made against the company whose servant he is, as in case of the default of any other officer of the government upon whom a like duty is imposed." (Page 618.)

And although the question has not reached the Supreme Court, of Pennsylvania lower court decisions hold, logically enough, that since the corporation or its treasurer is the agent of the Commonwealth for assessment and collection of the Corporate Loans tax, the tax may not be charged against the corporation in any years in which the taxing officers of the Commonwealth had informed the corporation that it did not have to assess or collect the tax, because in such cases there is no default on the part of the Commonwealth's agent which can be made the basis of an action against the agent.

Commonwealth v. Welsbach Company (1913), 16 Dauphin 130;
Commonwealth v. Lehigh Valley Railroad Company (1881), 44 Dauphin 248.

And the reason for this has been explained by Pennsylvania's courts to be that since the Loans tax requires the Commonwealth's agent to perform his duties by deducting the tax at the time the interest is paid, a retroactive imposition of the obligation would put the agent in the position of being required to do the impossible.

Commonwealth v. Erie Drygoods Company (1941), 50 Dauphin 411.

In the above case the Court refused, for the reasons described, to permit retroactive application of even a legislative decision to increase the Corporate loans tax rate from 4 mills to 8 mills. Furthermore, in that case the bonds were issued tax free (as Petitioner's 1902 Bonds were). But the Court held that this circumstance "had no bearing on the case and should not be allowed to becloud the issue". This latter decision is fully in accord with the law as established by the Supreme Court of Pennsylvania in *Commonwealth v. Barrett Manufacturing Company* (1914), 246 Pa. 301, 307, where the Supreme Court said:

> "Furthermore, the fact that the written obligations provide that the bonds and the interest thereon shall be paid 'tax free' does not enter into this case; that is a matter between the respective bondholders and the defendant corporation, and it can in no way affect the rights of the Commonwealth or the obligations of others towards the State so far as concerns the assessment and collection of its taxes."

And this is obviously sound because Petitioner in order to determine how much tax its bondholders owe the Commonwealth, and which it must pay under the tax free covenant in their behalf, must perform exactly the same duties at the time the interest is paid with respect to ascertaining the identities and the residences of the owners as it would if it were deducting the tax from the interest payments.

All of these principles which Petitioner regarded as settled law of Pennsylvania, and upon which it relied, although pressed upon the Supreme Court in brief and argument below, were either ignored or brushed aside as will be seen from the Supreme Court's Opinion.

VIOLATION OF THE DUE PROCESS CLAUSE

Petitioner concedes that Pennsylvania has the complete right to change its construction of its Corporate Loans tax laws whenever it sees fit to do so. But Pennsylvania cannot, without violating the Fourteenth Amendment, tell Petitioner for more than 20 years as the Commonwealth's agent to deal with the Corporate Loans tax that its agency does not embrace the Petitioner's bonds of 1902, and then reverse this position and say that Petitioner should have performed its agency during some of those past years regardless of what the Commonwealth's Courts and taxing authorities said, and on this basis hold Petitioner liable for not having so performed its agency.

The Corporate Loans tax is a charge upon and therefore directly related to interest payments on corporate indebtedness. Obviously all obligations of the law in respect of such interest payments must be established at the time the interest payments are made. The corporation cannot conform at some later date to requirements subsequently imposed in respect of interest payments that have already been made. To so require is an obvious violation of the Fourteenth Amendment.

The Court below placed its decision largely on the ground that the Commonwealth cannot be estopped from collection of its taxes. As a principle this cannot be disputed. However, in this case, the Commonwealth is not seeking to collect taxes. If it were doing this it should have told Petitioner, its agent, to collect and account for the taxes at the time the interest payments were made. Petitioner, by Pennsylvania's construction of its own law, is not the taxpayer, because the tax is on the bond holders. What the Commonwealth is here doing, as clearly shown by its own

decisions, is to impose a penalty upon this Petitioner equal to the amount of the tax as nearly as it can be ascertained, for not having accounted currently for the tax at the time the tax payments were due, and this is a penalty now imposed for not having done in past years what the Commonwealth then told Petitioner, as its agent, it did not have to do.

Subsequent to the decision from which this petition for certiorari is pursued, the Supreme Court of Pennsylvania itself has held that to give retroactive application to one of its taxes, the Corporate Net Income Tax, in circumstances where the retroactive application is a repudiation of assurances to the contrary given by responsible officers of the Commonwealth constitutes a denial of due process of law and a violation of the Fourteenth Amendment. The Court also said that "a tax may not be retroactively applied beyond the year of the general legislative session immediately preceding that of its enactment; to provide otherwise constitutes a denial of due process". (*Commonwealth v. The Budd Co.* (June 28, 1954), C. C. H. Penna. Tax Service P-11, 378; 106 Atl. 2nd —. If this is the law of Pennsylvania and this statement from the Supreme Court seems to be the announcement of a general principle, then certainly it must be likewise a denial of due process to give retroactive application to administrative action or judicial decision to a point where the taxpayer cannot possibly conform to the requirements.

This case seems clearly within the principles upon which *Nichols v. Coolidge* (1927), 274 U. S. 531, *Untermyer v. Anderson* (1928), 276 U. S. 440, and *Coolidge v. Long* (1931), 282 U. S. 582, were decided. Retroactive application of a taxing statute to a past event newly selected for taxation, was held in these cases to violate the due process clauses

of the Fifth and Fourteenth Amendments. Similarly in this case, the Commonwealth of Pennsylvania during the years 1940 to 1945 had indicated no change whatever in its position of more than 20 years previous standing that the holders of Petitioner's 1902 bonds owed no Corporate Loans taxes upon them and interest was therefore paid upon this assumption. The effect of the judgments in these cases is to decide as of 1946 that the tax was owed in the preceding years and to give retroactive effect to a newly determined tax liability. Under the cases cited this violates the Fourteenth Amendment.

And this Court has said that "the rudiments of fair play required by the Fourteenth Amendment are wanting" when it is necessary to guess accurately about the future course of events or be subject to a penalty under State law. *Chicago, Milwaukee and St. Paul Railway Company v. Polt* (1914), 232 U. S. 165. Petitioner in 1940, for example, had no way to guess that six years later the Commonwealth would change a position of more than 20 years' standing, and still less grounds to guess that even if it did, it would retroactively change its mind.

And see *Forbes Pioneer Boat Line v. Board of Commissioners* (1922), 258 U. S. 338, where this Court held that a State may not by retroactive action deprive a citizen of a right which theretofore existed. Under Pennsylvania law as it stood prior to the decision in this case, Petitioner, as the Commonwealth's agent, had the right to either be required to conform to the provisions of the Corporate loans tax at the time interest payments on its 1902 bonds were made, and if not so required to be free of any subsequently imposed obligation. A retroactive deprivation of these rights is a violation of the due process clause of the Fourteenth Amendment.

It should be noted that in states other than Pennsylvania the retroactive application of a changed construction of state tax laws has been held by the State Courts, entirely apart from the Fourteenth Amendment, to be against public policy and not sustainable. See *Waterbury Savings Bank v. Danaher* (1940), 128 Conn. 78; *Libby, McNeil & Libby v. Wisconsin Department of Taxation* (1952), 260 Wisconsin 551.

CONCLUSION

Petitioner has been unable to have the Courts of Pennsylvania or the administrative officers of that State consider the consequences of the retroactive action taken by taxing officers of the Commonwealth in this case. On the other hand Petitioner cannot help but take note of the fact that the Pennsylvania Courts have been more considerate of the effects of retroactive action in the cases of other taxpayers as shown by *Commonweath v. The Budd Company,* Supra and *Commonwealth v. Erie Dry Goods Company,* Supra. And see *Commonwealth v. Allied Building Credits, Inc.* (December 1953), Court of Common Pleas of Dauphin County, reported in C. C. H. Penna. Tax Service page 11, 287.

Petitioner, therefore, earnestly prays that a writ of certiorari may be granted in order that this Court may further consider the general principles governing retroactive state action within the Fourteenth Amendment, and determine whether a state may retroactively require compliance with state laws which by their terms can only be complied with currently.

JUDGMENT OF THE COURTS BELOW

Initial decrees of the Court of Common Pleas of Dauphin County appear at pages 79a (1940), 115a (1941), 139a (1942), 162a (1943), 187a (1944) and 215a (1945), of the record as printed below. Final judgment of the same Court in overruling Petitioner's exceptions appear in the same order at pages 93a, 118a, 142a, 166a, 191a, and 219a of the printed record.

The judgment of the Supreme Court of Pennsylvania, affirming the judgment below is embodied in its opinion. See Appendix II.

Respectfully submitted,

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APPENDIX I.

Title 72 Purdon's Pennsylvania Statutes Annotated.

§ 3250—10. State tax on scrip, bonds, etc.; imposition and rate of tax.

All scrip bonds, certificates, and evidences of indebtedness issued, and all scrip, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid by any and every private corporation, incorporated or created under the laws of this Commonwealth, or the laws of any other state or of the United States and doing business in this Commonwealth and having a resident corporate treasurer therein, except first class or nonprofit corporations, are hereby made taxable for State purposes at the rate of eight mills on each dollar of the nominal value thereof, during the calendar years one thousand nine hundred thirty-eight, one thousand nine hundred thirty-nine, one thousand nine hundred forty, one thousand nine hundred forty-one, one thousand nine hundred forty-two, and one thousand nine hundred forty-three, on reports filed for the calendar years one thousand nine hundred thirty-eight, one thousand nine hundred thirty-nine, one thousand nine hundred forty, one thousand nine hundred forty-one, one thousand nine hundred forty-two, and one thousand nine hundred forty-three, or for any fiscal year beginning in the calendar years one thousand nine hundred thirty-eight, one thousand nine hundred thirty-nine, one thousand nine hundred forty, one thousand nine hundred forty-one, one thousand nine hundred forty-two, and one thousand nine hundred forty-three, and at the rate of four mills on each dollar of the nominal value thereof during the calendar years one thousand nine hundred forty-four, and every year thereafter on reports filed for the calendar years one thousand nine hundred forty-four, (or for any fiscal year beginning in the calendar year one thousand nine hundred forty-four) and for every year thereafter: Provided, That whenever, under the provisions of this section, any private corporation shall become

liable for such taxes upon evidences of indebtedness by it assumed, or on which it shall pay interest, it shall be the duty of such corporation not later than ten (10) days thereafter, to give notice, in writing, to any person who may, at such time, be liable for the payment of any taxes upon such evidences of indebtedness, under the provisions of the third section of this act, that the corporation has assumed such indebtedness, or the payment of the interest thereon, and will deduct and pay the taxes imposed thereon by this section. Such notice shall also be given before the first day of October of each and every subsequent year during which such corporation is liable for the payment of such interest. Where any private corporation shall assume such evidences of indebtedness, or the payment of interest thereon, prior to the first day of October in any year, and shall give notice, as hereinbefore provided, such corporation shall be relieved from the duty of deducting and paying the taxes imposed by this section for the balance of such year; but shall deduct and pay said taxes for the ensuing year, and the person to whom such notice shall be given, shall, for such ensuing year be relieved from the payment of tax, under the provisions of the third section of this act, upon such evidences of indebtedness so assumed, or on which the corporation shall pay interest. Where any private corporation shall assume such evidences of indebtedness or the payment of interest thereon, on or subsequent to the first day of October in any year, and shall give the notice, as hereinbefore provided, such corporation shall be relieved from the duty of deducting and paying the tax upon such evidences of indebtedness by it assumed or on which it shall pay interest for the balance of such year and for the ensuing year, and the person, to whom notice is so given, shall pay the tax for the period for which the corporation is relieved upon such evidences of indebtedness so assumed, or on which the corporation shall pay interest, as provided for in the third section of this act. Neglect or failure on the part of any corporation, upon assuming any evidences of indebtedness or becoming liable for the payment of interest thereon, to give the notice as herein provided and within the time

prescribed, shall make such corporation liable for the payment of taxes from the time when such evidences of indebtedness are assumed, or for the entire period for which interest shall be paid. Neglect or failure to give such notice before the first day of October of each and every subsequent year, during which such corporation is liable for the payment of such interest, shall make the corporation liable for such taxes for the year following without any deduction from interest due as hereinbefore provided: Provided, That this section shall not apply to bank notes or notes discounted or negotiated by any bank or banking institution, savings institution or trust company, nor to interest-bearing accounts in any bank, banking institution, savings institution, employes' thrift or savings association, whether operated by employes or the employer, or trust company; nor to any scrip, bonds, certificates or evidences of indebtedness held in any trust forming part of a stock bonus, pension or profit sharing plan of an employer for the exclusive benefit of his employes, or their beneficiaries, which trust under the latest ruling of the Commissioner of Internal Revenue is exempted from Federal income tax: And provided further, That the provisions of this act shall not apply to building and loan associations or to savings institutions having no capital stock, and if at any time either now or hereafter, any persons, individuals, or bodies corporate have agreed or shall hereafter agree to issue his, their or its securities, bonds or other evidences of indebtedness, clear of and free from the tax or any part thereof, provided for in this act, or in the act, approved the seventeenth day of June, one thousand nine hundred thirteen (Pamphlet Laws, five hundred seven), or have agreed or shall hereafter agree to pay the same, nothing herein contained shall be so construed as to relieve or exempt him, it or them, from paying the tax imposed herein on any of such securities, bonds, or other evidences of indebtedness, as may be held, owned by, or owing to, the said savings institution having no capital stock: And provided further, That the provisions of this act shall not apply to fire companies, firemen's relief associations, life insurance companies, cas-

ualty or fire insurance corporations having no capital stock, secret and beneficial societies, labor unions and labor union relief associations, and all beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions: And provided further, That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock for State purposes, shall not be required to pay any further tax under this section, on the mortgages, bonds, and other securities owned by them in their own right; but corporations, limited partnerships, and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, except as executor or administrator of the estate of a non-resident decedent, and except as trustee for a resident or nonresident religious, charitable or educational organization, no part of the net earnings of which inures to the benefit of any private stockholder or individual, shall be liable for the tax imposed by this section upon all securities so held by them as in the case of individuals: And provided further, That none of the classes of property made taxable by this section for state purposes shall be taxed or taxable for county, school, or other local purposes: And provided further, That the provisions of this section shall not apply to personal property, of the classes hereinabove enumerated, received or acquired with proceeds of money or property received from any person or persons, copartnership or unincorporated association, or company, nonresident in or not located within this Commonwealth, or for any joint-stock association, limited partnership, bank or corporation formed, created, or incorporated by, under, or in pursuance of any law of the United States, or of any state or government other than this Commonwealth, by any person or persons, copartnership or unincorporated association resident in this Commonwealth, company, joint-stock company or association, limited partnership, bank or corporation created or existing under the laws of this Commonwealth or doing business within this Commonwealth as active trustee, agent, attorney-in-fact,

or in any other capacity for the use, benefit or advantage of any person or persons, copartnership or unincorporated association, or company non-resident in, or not located within, this Commonwealth, or for the use, benefit or advantage of any joint-stock company or association, limited partnership, bank or corporation formed, created or incorporated by, under, or in pursuance of any law of the United States, or of any state or government other than this Commonwealth; or any such property whatsoever owned, held or possessed by any person or persons, copartnership or unincorporated association resident in this Commonwealth, company, joint-stock company or association, limited partnership, bank or corporation created and existing under the laws of this Commonwealth or doing business within this Commonwealth in the capacity of executor or administrator of a nonresident decedent, or as trustee, agent or attorney-in-fact for any resident or nonresident religious, charitable, scientific, literary or educational organization, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

It is the intent of this act that all scrip, bonds, certificates, and evidences of indebtedness, made taxable under this section, are not taxable under the third section of this act, and that only such scrip, bonds, certificates, and evidences of indebtedness, which cannot be made taxable under this section, are to be taxed under the third section of this act. 1935, June 22, P.L. 414, § 17; 1936, First Ex. Sess., July 17, P.L. 51, § 1; 1937, May 18, P.L. 633, § 1; 1939, May 5, P.L. 76, § 1; 1941, July 11, P.L. 361, § 1; 1945, May 28, P.L. 1083, § 1.

§ 3250—11a. Reports and payment of the State tax by private corporations.

(a) It shall be the duty of the resident treasurer of each private corporation, incorporated by or under the laws of this Commonwealth or the laws of any other state or the United States or any foreign country, and doing business in this Commonwealth, except nonprofit corporations and cooperative agricultural associations not having capital

stock and not conducted for profit, *upon the payment of any interest upon any scrip, bond, certificate or evidence of indebtedness issued or assumed by such corporation,* or upon which it is liable for the payment of interest to residents of this Commonwealth and held by them, *to assess the tax imposed for State purposes by the seventeenth section of this act, upon the nominal value of each such scrip, bond, certificate or evidence of indebtedness, and to report, under oath or affirmation, annually, on or before the fifteenth day of March, for the calendar year next preceding, to the department, the amount of such indebtedness owned, held or in any manner possessed by residents of this Commonwealth, as nearly as the same can be ascertained, and it shall be his further duty to deduct the tax imposed by the seventeenth section of this act, on the payment of any interest upon such indebtedness and return the same to the State Treasury,* through the department, within the time prescribed by law, and his compensation for his services shall be five per centum on the first one thousand dollars ($1,000.00), or fractional part thereof, one per centum on all amounts over one thousand dollars ($1,000.00) and not over two thousand dollars ($2,000.00), and one-half of one per centum of all amounts over two thousand dollars ($2,000.00). Upon the payment of said State tax, such scrip, bonds, certificates or evidences of indebtedness shall be exempt from all other taxation in the hands of the holder of the same. (Italics added.)

The time for filing reports may be extended, taxpayers may be permitted to file their reports on a fiscal year basis, and the procedure and penalties in case of failure to report and pay the tax shall be as prescribed by law.

(b) It is the intent and meaning of this act that the tax for State purposes, imposed upon obligations of private and public corporations by section seventeen of this act, shall be collected in the same manner as the tax heretofore imposed for State purposes upon such obligations. 1935, June 22, P.L. 414, § 18, added 1937, May 18, P.L. 633, § 1, as amended 1939, May 5, P.L. 76, § 1; 1941, July 11, P.L. 361, § 1; 1945, May 28, P.L. 1083, § 1.

APPENDIX II.

In the Supreme Court of Pennsylvania
Middle District

Nos. 15, 16, 17, 18, 19, 20, May Term, 1953

Commonwealth of Pennsylvania,

vs.

Western Maryland Railway Company,
Appellant.

OPINION OF THE COURT

(Filed May 27, 1954)

HORACE STERN, C.J.

These are six appeals, consolidated into one record, from judgments of the Court of Common Pleas of Dauphin County sustaining resettlements of corporate loans taxes against the appellant corporation for the years 1940 to 1945, both inclusive.

The appeals are based partly on what amounts to an attempt to obtain a review of our decisions in *Fidelity-Philadelphia Trust Company Tax Case*, 354 Pa. 355, 47 A. 2d 267, and *Commonwealth v. New York, Chicago and St. Louis R. R. Co.*, 354 Pa. 388, 47 A. 2d 272, and partly on a contention that the Commonwealth, by reason of certain facts, is estopped from collecting the taxes for which these judgments were rendered.

On October 1, 1902, Western Maryland Rail Road Company, a corporation of the State of Maryland, whose principal line of railroad then extended from Baltimore to

Hagerstown, Maryland, created a first mortgage to secure an authorized issue of 4% bonds of which some $46,000,000 were ultimately issued. In 1909 the railroad was sold at foreclosure sale to a new company known as *The* Western Maryland *Railway* Company, also incorporated under the laws of the State of Maryland. A part of the railroad system was owned by various companies which had been formed to construct extensions, several of which were Pennsylvania corporations, and in 1917 The Western Maryland Railway Company and seven wholly-owned subsidiary corporations consolidated under the laws of Maryland and under the Pennsylvania Act of March 24, 1865, P.L. 49, the consolidated corporation taking the name of *Western Maryland Railway Company*, which is the appellant in the present proceedings. Thereafter *The* Western Maryland Railway Company ceased to have a separate existence. Western Maryland Railway Company assumed the obligations both as to principal and interest of the first mortgage 4% bonds, and thereby became liable for the corporate loans tax thereon by virtue of the Act of July 15, 1919, P.L. 955, which imposed the tax on bonds *assumed*, instead of merely, as theretofore on bonds *issued*, by the corporation. $11,623,318 of the bonds formed the basis of the resettlements of the Railway Company's corporate loans taxes by the Department of Revenue which were approved by the Board of Finance and Revenue. By those resettlements appellant's liability for the taxes for the six years above stated was fixed in an aggregate amount of $462,680.48.[1] Appeals were taken by the Railway Company to the court below which upheld the action of the Board and entered judgments ac-

[1] The Department of Revenue and the appellant agreed that the corporate loans tax settlements for the years 1940 to 1945, inclusive, should be based upon the list of Pennsylvania bondholders as of record in 1945 furnished by the appellant. After the appeals for those years were filed, it was stipulated by counsel that, in the event of a decision adverse to the appellant, it should have an opportunity to correct, if possible, inadequacies of information with respect to the ownership list for the year 1945. As a result of that stipulation it is alleged that appellant's actual liability can be shown not to exceed a total of $378,104.15.

cordingly; however, the court did not allow interest on balances of taxes due prior to the settlement on October 31, 1946, but only from that date. The Railway Company now appeals from the judgments thus entered.

In *Fidelity-Philadelphia Trust Company Tax Case*, 354 Pa. 355, 47 A. 2d 267, we held that bonds owned or possessed by a resident of Pennsylvania and issued by a foreign railroad corporation which thereafter became a component part of an interstate consolidated railroad company pursuant to a consolidation agreement filed in Pennsylvania and in other States, which consolidated company assumed the obligation to pay the interest on such bonds, were not subject to the State personal property tax even though the consolidated company's treasurer was not a resident of the State. This decision was based on the proposition that a corporation organized by the consolidation of corporations incorporated under the laws of several States was to be regarded as a domestic corporation in each of the States which authorized its existence and was subject to the laws of such State so far as its powers and liabilities therein were concerned. In *Commonwealth v. New York, Chicago and St. Louis R. R. Co.*, 354 Pa. 388, 47 A. 2d 272, we held that such bonds were subject to the corporate loans tax under Section 17 of the Act of June 22, 1935, P.L. 414, as reenacted and amended by the Act of May 18, 1937, P.L. 633. Those decisions, therefore, as applied to the Western Maryland Rail Road Bonds assumed by appellant, conclusively establish its liability for the corporate loans tax thereon. It is true that appellant was not a party in those cases, but it did appear in the *Fidelity-Philadelphia Trust Company Tax Case* as an amicus curiae, and some of the very bonds here in issue were involved in that appeal. Be that as it may, appellant now presents no persuasive argument to cast doubt on the correctness of those decisions or to deny their applicability to the present controversy.

Appellant's principal contention is based on Section 3 of the Act of March 24, 1865, P.L. 49, which reads as follows: "Upon the making and perfecting the agreement and

act of consolidation, * * * the several corporations, parties thereto, shall be deemed and taken to be one corporation, * * * possessing within this commonwealth, all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties, of each of such corporations, so consolidated." Appellant argues that Western Maryland Rail *Road* Company, which issued the bonds, and its successor *The* Western Maryland *Railway* Company, were immune from liability for the taxes here imposed, being foreign corporations with a non-resident treasurer and therefore not subject to the jurisdiction of the Commonwealth of Pennsylvania, and that the "immunity" thus claimed passed to the present appellant in accordance with the provision of the Railway Consolidation Act above quoted. The position thus asserted is obviously untenable. Apart from the fact that the Act of 1865 refers only to "rights, privileges and franchises," not "immunities,"[2] the Commonwealth of Pennsylvania never granted any immunity or exemption of taxation to Western Maryland Rail Road Company. That Company's freedom from taxation in Pennsylvania resulted only from the fact that it was a foreign corporation; had it domesticated itself as a Pennsylvania corporation under the Act of June 9, 1881, P.L. 89, such freedom or "immunity" would automatically have disappeared and it would have become subject to all the laws of the Commonwealth and to any and all taxes imposed thereby. By the same token, when it entered into a consolidation for the formation of the present appellant, which thereupon became a domestic corporation of the State of Pennsylvania, any "immunity" that it had enjoyed merely by reason of its having been a corporation under the laws of another State immediately vanished. In short, the fallacy of appellant's argument is in its treating Western Maryland Rail Road Company's freedom from taxation in Pennsylvania as though that Company had been given a specific statutory grant of tax exemption, a right which, it is argued, its successor, The

[2] Immunity from taxation is not a "franchise" of a corporation: *Morgan v. Louisiana*, 93 U. S. 217; *Pickard v. East Tennessee, Virginia and Georgia R. R. Co.*, 130 U. S. 637, 641, 642.

Western Maryland Railway Company, could then have taken into the consolidated corporation under the provisions of the Act of 1865.[3] It would obviously be absurd to hold that, entering the State as a component part of a Pennsylvania corporation, The Western Maryland Railway Company carried with it any "immunity" which it had theretofore enjoyed only because of its being beyond the jurisdiction of Pennsylvania. Indeed, were there any doubt otherwise on the subject, appellant, by assuming the obligation of the bonds, clearly became liable for the corporate loans tax thereon when the Act of July 15, 1919, P.L. 955, was enacted, with the same force and effect as if it had itself issued the bonds as a domestic corporation.

The second ground which appellant advances in support of its present appeals is that of estoppel. It appears that when it filed its corporate loans tax report for the year 1919 it did not include these bonds that had been originally issued by Western Maryland Rail Road Company, and no tax was settled thereon. In 1925 a corporate loans tax settlement was made for the year 1924 on a large portion of the bonds, and the Attorney General's office advised that the Company's appeal from that settlement should be disposed of by the court. Controversies arose also over the settlements for the years 1925, 1926 and 1927. The Board of Finance and Revenue eliminated the tax from the settlement for the year 1928 and no tax was thereafter imposed on these bonds until 1935. In 1936, as a result of negotiations appellant's liability for the years 1924 to 1927, inclusive, was compromised by the payment of a comparatively

[3] However, even a legislative exemption from taxation possessed by one of the constituent corporations does not ordinarily pass to the consolidated corporation, and especially if the consolidation statute does not employ the word "immunity" or "exemption", in the absence of which a mere transfer of the rights, privileges and franchise of a constituent company will not be sufficient to pass a tax exemption: 13 Am. Jur. 1103, 1104, §1200, and cases there cited; also *Chesapeake and Ohio R. R. Co. v. Miller*, 114 U. S. 176; *Pickard v. East Tennessee, Virginia and Georgia R. R. Co.*, 130 U. S. 637; *Wilmington and Weldon v. Alsbrook*, 146 U. S. 279.

nominal amount, a stipulation so providing was filed in the appeal proceedings which the Company had instituted in the Dauphin County Court, and judgment was entered thereon accordingly. Settlements were made against appellant for the tax on the full amount of the bonds for the years from 1935 to 1939, inclusive, but in 1943 resettlements for those years were made which excluded these bonds from the loans tax, and, since there was then pending in the Dauphin County Court an appeal on the settlement for the year 1936, a stipulation for judgment eliminating the tax for that year was filed in that proceeding.

What appellant thus points out, therefore, is that during the years from 1917 to and including 1939 either compromise agreements were entered into or no taxes at all were imposed by the Commonwealth on these bonds. Appellant claims that by this course of conduct the Commonwealth is now estopped from imposing the tax for the years beginning with 1940. It will be noted, however, that during all those preceding years there was considerable controversy concerning appellant's liability and that, in the absence of a court decision, the question necessarily remained inconclusive. But the important point to be noted is that no action whatever was taken by the Commonwealth in regard to the taxes for the years beginning with 1940 either by way of eliminating or compromising them. During those years all negotiations and actions remained in abeyance while the litigation was pending which culminated in the decisions in the *Fidelity-Philadelphia Trust Company Tax Case* and *Commonwealth v. New York, Chicago and St. Louis R. R. Co.* After those cases were decided and it therefore had become judicially determined that the corporate loans tax was properly imposed on bonds of this character the Commonwealth proceeded to settle appellant's liability for the taxes for the years from 1940 on through 1945, which are the settlements involved in the present appeals. It is therefore clear that the Commonwealth is not attempting to apply those decisions retroactively or to undo anything that took place in the years up to and including 1939 but is

merely applying the law as declared by this court to settlements for years which had been left open for that purpose.

We find no basis whatever for the contention that the Commonwealth has been estopped by reason of the failure of officials who, acting under a mistaken impression of the applicable law, either did not impose the taxes or compromised them for lesser amounts than were properly due. What has happened is that appellant has escaped the payment of the corporate loans tax on these bonds for a period of over 20 years, and it should not now be allowed to claim that because of such mistaken indulgence and errors of administrative practice no taxes can be imposed by the Commonwealth for any subsequent years.[4] It is a fundamental legal principle that a State or other sovereignty cannot be estopped by any acts or conduct of its officers or agents in the performance of a governmental as distinguished from a proprietary function. No errors or misinformation of officers or agents can estop the government from collecting taxes legally due. However firmly established the rule as to private individuals or corporations that where a person has been induced to act to his detriment by the representations of an agent he can hold the principal on the theory of estoppel, that rule does not apply when a government is the principal. It was said in *Easton Bank v. The Commonwealth*, 10 Pa. 442, 451, that "the rights of the Commonwealth are not liable to be compromised by the nonfeasance of her agents. Nor can her debtor escape through the mistake of her servants acknowledging a sum less than the whole due, as received in full." So, in *Delaware Division Canal Co. v. The Commonwealth*, 50 Pa. 399, 408, it was said: "The second reason for non-liability of this company, viz. that the accounting officers thought so and omitted to charge the tax for the years mentioned, needs but little remark. The mistakes or misapprehensions of these officers could not prejudice the Commonwealth." In *Commonwealth v. Quaker City Cab Co.*, 287 Pa. 161, 168,

[4] Western Maryland Rail Road Company First Mortgage 4% Bonds matured in 1952.

134 A. 404, 407 (reversed on another ground, 277 U. S. 389) it was said: "That for eighteen years after the advent of taxicab companies taxes were not assessed against them under the act in question is an administrative construction favorable to defendant, but cannot prevail against the plain language of the statute. The state cannot be prejudiced by the neglect of its officers to settle and assess a tax." In *Commonwealth v. Taylor's Executors*, 297 Pa. 335, 343, 147 A. 71, 74, it was said: "Defendant's contention is, in effect, that the letter of the auditor general operated to altogether estop the Commonwealth. No authority is given for this contention and we know of none. As a sovereign state we cannot be thus estopped, * * *." In *Cumberland County v. Lemoyne Trust Company*, 318 Pa. 85, 98, 99, 178 A. 32, 38, it was stated that " 'No estoppel in pais can be asserted against the exercise by the State of its taxing power. Accordingly, the State is not estopped to levy and collect taxes on particular property by failure to assess it for a number of years, nor can the rights of the State in this respect be forfeited by the laches of its agents; * * *' 61 C. J. 87, and cases cited. 'Neither a state nor a municipality is estopped to tax property because of failure for a number of years to exercise such right.': Cooley on Taxation (4th ed.), page 159." In *Commonwealth v. A. M. Byers Co.*, 346 Pa. 555, 560, 561, 31 A. 2d 530, 532, it was said: "No administrative officer or body, exercising discretion conferred by the legislature, is vested with the power to abrogate the statute law of the Commonwealth, or to grant to individuals an exemption from the general operation of the law. * * * It is well settled that no estoppel can be asserted against the State in the exercise of its taxing power." And in *Federal Deposit Insurance Corporation v. Board of Finance and Revenue*, 368 Pa. 463, 472, 84 A. 2d 495, 499, it was declared that "it is the law which is to govern rather than departmental opinions in regard to it."

Appellant urges that, since the only duty of a corporation with respect to the corporate loans tax is to collect it from the bondholders, (*Commonwealth ex rel Baldridge v. Sun Oil Co.*, 294 Pa. 99, 102, 143 A. 495, 496; *Fidelity-Philadel-*

phia Trust Company Tax Case, supra, p. 360, A. p. 271) it should not be held liable for a failure to effect such collections when misled by officers of the Commonwealth into believing that no such duty rested upon it as to these bonds. This contention, however, overlooks the fact that the bonds were issued by Western Maryland Rail Road Company tax-free both as to principal and interest, and that appellant, in assuming the obligation of the bonds, became subject to that covenant. Its status, therefore, is not merely that of a collector of the tax from the bondholders, for it is barred because of such covenant from collecting any tax from them; it owes the tax directly to the Commonwealth, not as a penalty for failing to collect it from the bondholders, but because of its contract obligation with them to pay the tax itself. In *Commonwealth v. Harrisburg*, 335 Pa. 202, 206, 207, 6 A. 2d 863, 865, 866, it was pointed out that, while ordinarily the corporation is not primarily the debtor for the tax but the agent of the State to collect it, the situation is different where the bonds are issued tax-free; in such case, said the court, "there can be no escape from the conclusion that the (corporation) is liable for the tax, as it has already said in its contract with the one who owes it that he need not pay it but that the (corporation) itself will pay it. * * * We see no escape from the conclusion that the (corporation) must, therefore, account to the state for the tax."

Judgments affirmed.

Mr. Justice Chidsey did not participate in the consideration or decision of this case.

FILED
SEP 25 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 298

WESTERN MARYLAND RAILWAY COMPANY,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

GEORGE W. KEITEL,
Deputy Attorney General,
FRANK F. TRUSCOTT,
Attorney General,
Attorneys for Respondent.

State Capitol
Harrisburg, Pennsylvania.

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OPINIONS BELOW

The opinions below are as set forth in the Petition. The Opinion of the Supreme Court of Pennsylvania is officially reported at 377 Pa. 312.

JURISDICTION

The Petitioner invokes the jurisdiction of this Court under Title 28 U.S. Code, § 1257(3), presumably because "the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * of the United States". Respondent contends that such jurisdiction does not lie, because the validity of the State statute here involved was not properly drawn in question on the ground of its being repugnant to the Constitution of the United States, and the court below did not pass upon that question in sustaining the validity of the State statute.

QUESTIONS PRESENTED

If the question for review is as stated in the Petition, the following questions must also be considered:

1. Since the Petitioner failed to object to the tax settlements here in question on the ground of denial of due process of law under the Constitution of the United States at any time before the State taxing officers or in its Appeal to the Court of Common Pleas of Dauphin County, with the result that the court below had no jurisdiction to decide the due process question, may that question be presented now in these proceedings?

2. Where the State taxing officers held open without settlement the Petitioner's taxes for the years in question (1940 through 1945) pending a decision of the Supreme Court of Pennsylvania as to whether the Petitioner's bonds here involved were taxable, were the settlements made in 1946 after the court decided that the bonds were taxable a "retroactive" application of the tax statute?

3. Was the imposition of corporate loans tax upon the Petitioner a "penalty" where the Petitioner had convenanted with its bondholders to pay all such taxes?

STATUTES INVOLVED

The Pennsylvania Corporate Loans Tax is imposed by Section 17 of the Act of June 22, 1935, P. L. 414, as reenacted and amended, 72 PS § 3250.10, which provides in part:

> "All script, bonds, certificates, and evidences of indebtedness issued, and all *script, bonds, certificates, and evidences of indebtedness assumed, or on which interest shall be paid* by any and every private corporation, incorporated or created under the laws of this Commonwealth, or the laws of any other state or of the United States and doing business in this Commonwealth and having a resident corporate treasurer therein, except first class or nonprofit corporations, are hereby made taxable for state purposes * * *" (Emphasis supplied.)

For the years 1940, 1941, 1942, and 1943 the tax was imposed at the rate of eight mills on each dollar of the nominal value of the bonds; for 1944 and 1945 the rate was four mills.

Section 18 of the Act (72 PS § 3250.11a) provides for the collection of the tax through the treasurer of the corporation.

The Pennsylvania Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, provides in Sections

801 and 802 for the settlement of taxes by the State fiscal officers; in Section 1102 for resettlement; in Section 1103 for review by the Board of Finance and Revenue; and in Section 1104 for appeal to the court of Common Pleas of Dauphin County (72 PS §§ 801, 802, 1102, 1103, 1104). Section 1104 provides in part as follows:

> "Appeals taken hereunder shall be hearings de novo, and no questions shall be raised by the appellant that were not brought to the attention of the department making the settlement, or in the application for resettlement, or petition for review prior to the appeal, and set forth in the specification of objections contained in the affidavit accompanying the appeal, unless the court shall be satisfied that the appellant was unable, by the exercise of reasonable diligence, to have raised such questions before the department making the settlement and the Board of Finance and Revenue, and no questions shall be raised which are not included in the specification of objections filed as hereinbefore provided."

STATEMENT OF THE CASE

As Petitioner has pointed out, since 1920 repeated attempts have been made by the taxing officers of the Commonwealth of Pennsylvania to impose Corporate Loans Taxes on the bonds of Petitioner here in question, but in every instance prior to the tax for the year 1940 the controversy was resolved at the administrative level in favor of the Petitioner.

The final effort to tax these bonds was made in connection with the *Fidelity-Philadelphia Trust Company Tax* case, 354 Pa. 355, 47 A. (2d) 267 (1946). While that case was pending, no corporate loans tax settlements were made against the Petitioner for the years 1940 through 1945, but were held in abeyance pending the outcome of the case in the Supreme Court of Pennsylvania.

In 1946, after that case was decided in favor of the imposition of corporate loans tax on these bonds, the taxing officers of the Commonwealth of Pennsylvania for the first time settled corporate loans taxes against the Petitioner for the years 1940 through 1945. Consequently, the settlements in 1946, being the first step in the tax determination procedure, could not in any legal sense be said to have been retroactive.

In upholding the Commonwealth's tax settlements in the present case, the Supreme Court of Pennsyl-

vania reaffirmed its ruling in the *Fidelity-Philadelphia Trust Company Tax Case,* supra, that the Petitioner's First Mortgage 4% Bonds were subject to Pennsylvania corporate loans tax. The Petitioner does not now question the correctness of the general conclusion of taxability, but objects to the imposition of the tax for the years 1940 through 1945 because Petitioner contends that this is an unconstitutional "retroactive" application of the tax statute. On the contrary, the taxes for the years in question were never settled or determined initially until after the said decision of the Supreme Court of Pennsylvania, and could not have been retroactively imposed.

The Petitioner had covenanted with its bondholders to pay all such taxes which might be levied upon these bonds. Thus, the Petitioner voluntarily assumed liability for all such taxes properly levied, and therefore cannot complain of this tax as "penalty taxation".

The question of the violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution was not raised by the Petitioner in its Petition for Resettlement or its Petition for Review before the State taxing officials; nor in its Appeal and Specification of Objections filed with the Court of Common Pleas of Dauphin County. Under the provisions of The Fiscal Code of Pennsylvania, failure to raise this constitutional question before the taxing officers or in its appeal precluded the Petitioner from thereafter raising the question be-

fore either the Court of Common Pleas of Dauphin County or the Supreme Court of Pennsylvania. Consequently, Petitioner waived its right to have any question of due process considered in this case.

However, even if the due process question had been properly raised, the action of the State taxing officials in applying the tax statute in accordance with the interpretation of the Supreme Court of Pennsylvania as to those years which had not yet been settled cannot be construed as an unconstitutional deprivation of property without due process of law.

ARGUMENT

1. Federal Question Not Properly Raised

Petitioner seeks to have this Court review the decision of the Supreme Court of Pennsylvania on the basis that the validity of the Pennsylvania taxing statute has been drawn into question on the ground that it is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Petition admits (p. 10) that the question of due process was raised for the first time by Petitioner in exceptions to the decision of the Court of Common Pleas of Dauphin County, and further contends that when the Exceptions were overruled, "the question was presented to the Supreme Court of Pennsylvania, which completely ignored the point in its final decision".

However, the Petitioner has failed to raise the due process question in the manner required by the procedural statutes of Pennsylvania, particularly section 1104 of The Fiscal Code, quoted in part supra at page 5. That section limits the scope of the judicial proceedings to matters raised in the Specifications of Objections on Appeal to the Court of Common Pleas of Dauphin County, and provides that the courts may not consider any questions which are not raised in the statutory manner.

Accordingly, Petitioner must be deemed to have waived any substantive question of due process in the present case. For that reason no Federal question has been properly raised, and there is no basis for the jurisdiction of this Court.

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2. Tax Settlements Were Not Retroactive

In order to bring itself within the scope of the Due Process Clause of the Fourteenth Amendment, Petitioner alleges that the tax was imposed retroactively against it. There is no legal basis for such a contention.

The only settlements made by the Pennsylvania fiscal officers against the Petitioner are the settlements now appealed from. As to these years, there was never any change of policy, or practice, or law. The taxes claimed by the Commonwealth were determined for the first and only time when the settlements against the Petitioner were made. These settlements were no more retroactive in the legal sense than any settlement of any tax which is made at a time subsequent to the year for which the tax is being imposed. It cannot seriously be contended that the lapse of time between the tax year and the time of settlement constitutes a retroactive violation of due process.

The tax statute itself could not possibly be construed as retroactive, since the tax here involved

has been imposed on these bonds of Petitioner ever since the amendatory Act of July 15, 1919, P. L. 955.

Therefore, the only conceivable basis for the Petitioner's claim of retroactivity concerns the interpretation of the tax statute by the Supreme Court of Pennsylvania in *Fidelity-Philadelphia Trust Company Tax Case,* supra (354 Pa. 355), which held that the First Mortgage 4% Bonds of the Petitioner, the bonds here in question, were subject to the Corporate Loans Tax. That decision was considered by the Supreme Court of Pennsylvania in the instant case as determinative of these taxes.

That case decided that the Petitioner's First Mortgage 4% Bonds had always been taxable for Corporate Loans tax purposes since the Act of 1919. Such decision was binding on the Commonwealth's taxing officers, particularly as to the making of settlements for years that had not yet been taxed, i.e., 1940 through 1945. Thus, while the effect of the decision of the Court may have been retroactive in a judicial sense, nevertheless the tax settlements made thereunder and thereafter were prospective only.

In *Fleming v. Fleming,* 264 U.S. 29, 31 (1924), this Court said:

> "The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means."

In *Marceau v. Great Lakes Transit Corp.,* 146 F. (2d) 416, 419 (C.C.A. 2d 1945), cert. den., 324 U.S.

872, the court, in discussing the effect of a decision of this Court construing the Jones Act, said:

> "The decision of the Supreme Court * * * must be regarded as no more than a declaration of what was the law from the date the Jones Act took effect."

This has also been the law of Pennsylvania. In *Buradus v. General Cement Products Co.*, 159 Pa. Super. Ct. 501, 504, 356 Pa. 349, 52 A. (2d), 205, 208 (1947), the Court said:

> "In general, the construction placed upon a statute by the courts becomes a part of the act, *from the very beginning.*"

In *Gulf, Colorado & Santa Fe Railway Co. v. Moser,* 275 U.S. 133, 136 (1927), this Court said:

> "The interpretation approved by us has become an integral part of the statute."

Similarly, the interpretation approved by the *Fidelity-Philadelphia Trust Company Tax Case,* supra, became an integral part of the Pennsylvania tax statute from the very beginning.

The settlement for the years here in question had been held open pending the decision in the *Fidelity-Philadelphia Trust Company Tax Case,* supra. After that decision was handed down, the State taxing officers had no alternative but to follow it, and to settle the taxes against the Petitioner in accordance with the statute as interpreted by the Supreme Court of Pennsylvania.

Argument

Where a question has been decided by the courts, executive officers are bound thereby and may not change or modify such decision: 16 C.J.S. Constitutional Law, p. 516, Section 171; *Standard Surety and Casualty Co. v. Oklahoma,* 145 F. (2d) 605, 609 (1944).

The situation was aptly summarized by the Supreme Court of Pennsylvania when it stated (Petition, Appendix II, p. 32):

> "* * * It is therefore clear that the Commonwealth is not attempting to apply those decisions retroactively or to undo anything that took place in the years up to and including 1939 but is merely applying the law as declared by this court to settlements for years which had been left open for that purpose."

The court below further pointed out that merely because the Petitioner had escaped the payment of corporate loans tax on these bonds for a period of over 20 years, it should not now be allowed to claim that because of such mistaken indulgence and errors of administrative practice no taxes can be imposed (Petition, Appendix II, p. 33).

Consequently, there has been no retroactive imposition of tax such as to enable the Petitioner to invoke the due process clause of the Fourteenth Amendment.

3. Petitioner Has Not Been Subjected to a Penalty

Petitioner is attempting to construe the imposition of the Corporate Loans Tax on its First Mortgage 4% Bonds as being in the nature of a penalty since its only duty under the tax statute was to collect the tax from the bondholders, and it failed to do so in reliance upon the previous policy of the taxing officers.

This contention was completely answered by the Supreme Court of Pennsylvania when it said (Petition, Appendix II, p. 35):

> "* * * This contention, however, overlooks the fact that the bonds were issued by Western Maryland Rail Road Company tax-free both as to principal and interest, and that appellant, in assuming the obligation of the bonds, became subject to that covenant. Its status, therefore, is not merely that of a collector of the tax from the bondholders, for it is barred because of such covenant from collecting any tax from them; it owes the tax directly to the Commonwealth, not as a penalty for failing to collect it from the bondholders, but because of its contract obligation with them to pay the tax itself. * * *"

Under the law of Pennsylvania, the Petitioner became liable to the Commonwealth for the tax under the tax free covenant. Therefore, the Petitioner is

obligated to pay this tax irrespective of the date of settlement. Moreover, no equities arose in favor of the Petitioner.

Prior to the settlement in the present case, the Department of Revenue and the Petitioner agreed that the corporate loans tax settlement for the years 1940 to 1945, inclusive, should be based upon the list of bondholders as of record in 1945 furnished by the Petitioner (R. 29a). There is no reason to believe that the percentage of Pennsylvania holders of this indebtedness differed materially between 1940 and 1945.

Furthermore, after the appeals for those years were filed, it was stipulated by counsel for the parties that, in the event of a decision adverse to the Petitioner, it should have an opportunity to correct, if possible, inadequacies of information with respect to the owners listed for the years 1945 (R. 29a, 16a, 17a). As a result of that stipulation, the Petitioner will be able to achieve a considerable reduction in the principal amount of tax due under the judgments of the court below; see Petition, Appendix II, p. 28, footnote 1.

The trial court gave the appellant equitable concessions by refusing to charge interest on the principal balance of the tax due for the period prior to the settlement of October 31, 1946, and by refusing to allow Attorney General's commission on these accounts (R. 78a). The Commonwealth did not file any exceptions to this portion of the trial court's adjudication.

Even if it could be demonstrated that there was a retroactive imposition of tax here, nevertheless the Petitioner could show no harm by reason of the delay in holding up the tax settlements until after the decision of the Pennsylvania Supreme Court. Thus, the Petitioner would have no vested or property rights entitled to the protection of the Due Process Clause of the Fourteenth Amendment.

Accordingly, the Petition for Certiorari should be dismissed at the cost of the Petitioner.

Respectfully submitted,

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